No. 75-1452

In the Supreme Court of the United States

OCTOBER TERM, 1976

KIMBELL, INC., D/B/A FOODWAY, FURR'S, INC., SAFEWAY STORES, INC., AND SHOP RITE FOODS, INC., D/B/A PIGGLY WIGGLY, APPELLANTS

v.

EMPLOYMENT SECURITY COMMISSION OF THE STATE OF NEW MEXICO, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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CITATIONS

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This memorandum is submitted pursuant to the Court's order of June 1, 1976, inviting the Solicitor General to express the views of the United States in this case. The question presented is whether New Mexico's limited grant of unemployment compensation benefits to strikers is in conflict with, and thus precluded by, federal labor law. In our view it is not, and the appeal should be dismissed for want of a substantial federal question.

STATEMENT

The appellants are operators of retail food stores in various New Mexico communities who are members of a multi-employer bargaining unit which negotiates with the Amalgamated Meat Cutters & Butcher Workmen of North America, AFL–CIO, Local 391 (the Union). During bargaining negotiations in October 1971, the Union informed appellants that, if negotiations did not culminate in a new agreement by the time the old contract expired, it would strike them one by one until they capitulated to its demands. On October 23, 1971, when the meat department employees of one member of the unit struck, the other members of the unit locked out their meat department employees to prevent "whipsaw" strikes. As a result, all union employees of the meat departments were out of work from October 23, 1971, to December 4, 1971, when the strike was settled by execution of a new agreement. During that period the meat departments continued to operate with temporary replacements (J.S. 4–6).[1]

During the strike 226 meat department employees filed claims for unemployment compensation (J.S. 6). The New Mexico Unemployment Compensation Law, 1953 N. M. Stat. Ann. Sections 59–9–1 to 59–9–29 (2d Repl., 1974), disqualifies an applicant for benefits whose "unemployment is due to a stoppage of work which exists because of a labor dispute * * *." Section 59–9–5(d).[2] The New Mexico Unemployment Security Commission, on June 21, 1972 (some 6 months after the strike was settled), found that the strike did not substantially interfere with business operations, and thus did not amount to a "stoppage of work" within the meaning of Section 59–9–5(d). The Commission therefore awarded unemployment compensation benefits to the claimants, totaling $47,459. (J.S. 6; Motion to Dismiss 3.)

The New Mexico District Court for the Second Judicial District reversed the Commission, holding, *inter alia*, that the payment of unemployment compensation to the claimants would interfere with federal labor policy (J.S. 7–8). The Supreme Court of New Mexico reversed the district court (J.S. App. 3a), citing its decision in *Albuquerque-Phoenix Express, Inc.* v *Employment Security Commission*, 544 P. 2d 1161, 88 N. M. 596 (J.S. App. 4a–20a), which had been handed down five days earlier. In that case

[1] "J.S." refers to the Jurisdictional Statement.

[2] The New Mexico Act has been approved by the Secretary of Labor pursuant to the Federal Unemployment Tax Act, 68A Stat. 439, as amended, 26 U.S.C. 3301, et seq. That Act imposes a national payroll tax on employers against which credit is allowed for payments made to qualifying state funds. The federal law provides that state laws which require recipients to accept new work cannot deny eligibility to persons who refuse to accept such work because (1) the position offered is vacant due to a labor dispute, (2) the wages offered are less than those prevailing in the area, (3) membership in a company union or resignation from a bona fide union is a condition of employment. 26 U.S.C. 3304 (a)(5). State laws which meet these and the other conditions specified in Section 3304(a) "shall" be approved by the Secretary of Labor "within 30 days of submission."

the court had held that the phrase "stoppage of work" in the state law refers to a cessation or substantial curtailment of the employer's business activities, rather than to a cessation of any given claimant's labor.[3] Accordingly, since the strike there (as here) had not resulted in such a cessation or substantial curtailment, the striker-claimants were entitled to unemployment compensation. The court in *Albuquerque-Phoenix* had also noted that, contrary to the recent federal district court decision in *Hawaiian Telephone Company* v. *State of Hawaii Department of Labor,* 405 F. Supp. 275 (D. Hawaii), concerning Hawaii's unemployment benefits, it did not consider payment of unemployment compensation pursuant to New Mexico law to be an encroachment on federal labor policy; it emphasized that the employee is eligible for such compensation only if he is "available for, and actively seeking work" (J.S. App. 11a, n. 1).

[3] Most state unemployment compensation laws are patterned on a draft bill prepared by a committee of the Social Security Board in 1936. That bill, in turn, was patterned after British unemployment compensation legislation which contained a "stoppage of work" disqualification. See Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. Chi. L. Rev. 294, 295, 307–308 (1950); *Unemployment Benefits—"Stoppage of Work,"* 61 ALR 3d 693, 696. The laws of 30 states contain such a disqualification. Twelve additional states disqualify applicants whose unemployment is due to a labor dispute "while the dispute is in active progress." *Comparison of State Unemployment Insurance Laws*, United States Department of Labor, Bureau of Employment Security, BES Publication No. U-141, ET-13 (1965). The New Mexico interpretation of the "stoppage of work" clause—as referring to a substantial stoppage of the employer's operations—is in accord with the majority view. 61 ALR 3d, *supra*, at 697–704, 705; Shadur, *supra*, 17 U. Chi. L. Rev. at 307–310. See also *infra*, p. 9, n. 7.

DISCUSSION

1. Appellants contend that the State's grant of unemployment compensation to strikers disturbs the balance of power between employers and unions which Congress struck in the National Labor Relations Act and thus is barred by the Supremacy Clause of the federal Constitution (J.S. 9–15). The Supreme Court of New Mexico properly rejected this contention.[4]

a. The preemption issue initially turns on Congress' intent when it enacted and subsequently amended the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and the Social Security Act, Title IX, 49 Stat. 639, as amended by the Federal Unemployment Tax Act, 68A Stat. 439, 26 U.S.C. 3301, *et seq.* The history of those Acts shows that Congress concluded that a uniform policy on the payment of unemployment compensation to strikers was not essential to the federal regulatory scheme, and thus elected to leave this matter to the judgment of each State.

As the First Circuit noted in *Grinnell Corp.* v. *Hackett,* 475 F. 2d 449, 454, certiorari denied, 414 U.S. 858:

> In July 1933, the Federal Emergency Relief Administration (FERA) ruled that it would not "attempt to judge the merits of labor disputes" but would treat unemployed strikers like all other unemployed persons for purposes of relief. * * * This policy became a bone of contention during the textile strike of September

[4] It did so, as we have shown, virtually without discussion.

> 1934. * * * Congress could hardly have been unaware of this policy when in 1935 it passed in close succession both the National Labor Relations Act, * * * and the Social Security Act * * *, Title IX of which * * * is now the Federal Unemployment Tax Act * * *. [Citations omitted.]

In neither statute, however, did Congress attempt to preclude the states from exercising their own judgment as to payments to striking workers. Not only did the Social Security Act establish standards for state programs which did not contain any disqualification for strikers benefits (*supra*, p. 3, n. 2)[5]; but also, within a few years of its enactment, the Secretary of Labor, pursuant to 26 U.S.C. 3304(a), approved four state laws which allowed payments to strikers (*Grinnell, supra*, 475 F. 2d at 454–455).

Moreover, in 1947 the Hartley Bill, passed by the House, provided that a striker who accepted unemployment compensation benefits would no longer be considered an "employee" under the National Labor Relations Act (H.R. 3020, 80th Cong., 1st Sess., Section 2(3) (1947)), and thus would lose all rights under the Act, because such benefits were "a perversion of the purposes of the social security laws." H.R. Rep. No. 245, 80th Cong., 1st Sess. 12 (1947). In

[5] Indeed, that Congress considered this a proper matter for local determination is shown by the fact that in 1935 Congress also enacted the District of Columbia Unemployment Compensation Act, 49 Stat. 946, *et seq.*, which denied benefits to any individual unemployed as a result of a "labor dispute still in active progress." Section 19(a)(6), 49 Stat. 950. That provision is still in effect. 46 D.C. Code, 310 (f).

conference, however, the provision was dropped without explanation.

Finally, in 1969, the House, which was conducting hearings on legislative proposals to amend the Social Security statutes, rejected President Nixon's proposal that strikers be deemed statutorily ineligible for such benefits. House Committee Chairman Wilbur Mills explained:

> We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people. * * *
>
> For example, there are two States * * * which will pay unemployment benefits when employees are on strike * * *. * * * [I]f the State wants to do it we believe they ought to be given latitude to enable them to write the program they want. [115 Cong. Rec. 34106 (1969).]

Moreover, where Congress has wanted to set federal standards governing access of strikers to unemployment benefits, it has done so. Thus, the Railroad Unemployment Insurance Act (52 Stat. 1094, as amended, 45 U.S.C. 351, *et seq.*) provides that only participants in unlawful strikes may be denied benefits. 45 U.S.C. 354(a–2)(iii). Congress also amended the Food Stamp Act (78 Stat. 703, as amended, 7 U.S.C. 2011, *et seq.*), in 1971, to prohibit states from denying food stamps to strikers. 7 U.S.C. 2014(c). Furthermore, Congress' stated reason for rejecting a provision denying such aid to strikers was its determination not "to take sides in labor disputes." H.R. Rep. No. 91–1402, 91st Cong., 2d Sess. 11 (1970).

In sum, it is apparent that Congress over the years has been aware of disparate attitudes in the states as to the advisability of allowing strikers access to unemployment benefits and has decided to permit the diversity to continue. Cf. Section 14(b) of the National Labor Relations Act, 29 U.S.C. 164(b).[6]

b. Even if, as the First Circuit held in Grinnell, it were necessary to weigh possible harm to the collective bargaining process from paying unemployment compensation to strikers against the State's interest in making such payments to determine whether federal

[6] The First Circuit in *Grinnell*, *supra*, considered the legislative history ambiguous, apparently because of the lack of any explicit congressional enactment on the subject of unemployment benefits for strikers. 475 F. 2d at 456–457. The court held that the validity of Rhode Island's policy of paying such benefits should be determined by balancing the interference with the federal policy of collective bargaining against the competing demands of state policy. Finding insufficient evidence in the record to make this determination, the court remanded the case to the district court for further proceedings. *Id.* at 459–461. (To the same effect see *Dow Chemical Co.* v. *Taylor*, 57 F.R.D. 105, 108 (E.D. Mich).)

In our view the remand was unnecessary because the legislative history is not ambiguous as to Congress' lack of preemptive intent. Cf. *San Diego Bldg. Trades* v. *Garmon*, 359 U.S. 236, 239–243; *Bethlehem Steel Co.* v. *New York Board*, 330 U.S. 767, 772–776. In any event, the Rhode Island law involved in *Grinnell* could have more impact on the bargaining process than does the New Mexico law here. It does not have a "work stoppage" exception, but rather provides unemployment compensation for all strikers, after a specified waiting period. See discussion *infra*, pp. 8–9.

In *Hawaiian Telephone Company*, *supra*, the district court, following the lead of *Grinnell*, also found the legislative intent to be unclear. 405 F. Supp. at 285–289. The court held that Hawaii's policy of paying unemployment compensation to strikers impermissibly interfered with the federal process of collective bargaining. For the reasons stated above, we believe that decision to be erroneous.

labor policy was violated, it seems clear that New Mexico's policy of awarding unemployment benefits to strikers would pass the test. As noted (*supra*, p. 4), the New Mexico law permits compensation to strikers only where no "stoppage of work" results from their efforts, and the Supreme Court of New Mexico has interpreted that phrase to mean a work stoppage which results in a substantial curtailment of the employer's operations.[7] Thus, the New Mexico law does not provide the strikers with an expectation of payment upon which they could rely in planning their strategy; indeed, the condition under which compensation may be paid runs directly counter to the employees' strike objective of imposing as substantial an impact on the employer's business operations as possible.[8] And, any influence which the award of unemploy-

[7] The New Mexico interpretation is in accord with the recommendation of the United States Department of Labor, Bureau of Employment Security. Its publication, *Unemployment Insurance Legislative Policy, Recommendations for State Legislation 1962* (USES Publication No. U212A, October 1962), states (p. 70):

"Some States have had, and still do have, a limited disqualification period for unemployment due to a labor dispute. Since most disputes do not last as long as the 6 or 7 weeks plus waiting period specified in those State laws, such provisions have little effect on the length of the disqualification. However, the payments of benefits to strikers represents a departure from the program's traditional policy of neutrality in labor disputes. *The Bureau recommends that the labor-dispute disqualification continue, in general, as long as the labor dispute causes a substantial stoppage of the employer's work.*" [Emphasis added.]

[8] "In its history of adjudicating the applicability of the labor dispute disqualification provision of the New Mexico Unemployment Compensation Statute, the Employment Security Commission of New Mexico has awarded benefits to claimants whose unemployment was due to a labor dispute in only three cases * * *" (Motion to Dismiss 3).

ment benefits could have had on the relative economic strength of the parties in this dispute is further minimized by the fact that the Employment Security Commission did not make its award until the strike had been over for 6 months.[9]

2. A final factor militating against plenary review in this case is that there is no conflict of decisions requiring resolution by this Court. *Grinnell, supra*, while calling for a weighing of federal and state interests, did not find that the state statute conflicted with the federal statute but merely remanded the case for further proceedings. *Hawaiian Telephone, supra*, if it conflicts with the decision below, is in any event a district court decision, which is now on appeal to the Ninth Circuit. The issue is also being litigated in other cases.[10] In the absence of a conflict of appellate de-

[9] In the context of back pay awards, this Court has upheld the Board's long practice of treating unemployment compensation as an incidental benefit, not to be considered in computing such awards. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365. In *Gullett*, the Court, referring to the House provision of the Hartley Bill which was rejected in 1947 (*supra*, p. 6), added that the Board's practice regarding unemployment compensation was known to Congress when it enacted the Taft-Hartley amendments. "Under these circumstances it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal [Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c)], Congress accepted the construction placed thereon by the Board and approved by the courts." *Id.* at 366. The same can be said in the present context.

[10] *E.g., New York Telephone* v. *New York State Department of Labor*, pending decision, S.D.N.Y., 73 Civ. 4557.

See also *Unemployment Compensation Board of Review* v. *Sun Oil Co. of Pa.*, 338 A. 2d 710, 715–717 (Pa. Comm. Ct.) (rejecting the contention that the Pennsylvania law awarding unemployment compensation to employees locked out during a labor dispute upsets the balance of power because it increases the employer's tax rate and diminishes the impact on employees of being out of work); *National Gypsum Co.* v. *Administrator, Louisiana Department of Employment Security*, 313 So. 2d 230, 234 (La. Sup. Ct.), appeal dismissed, 423 U.S. 1009 (sustaining an award of unemployment compensation to employees locked out during a labor dispute). Cf. *ITT Lamp Div.* v. *Minter*, 435 F. 2d 989 (C.A. 1), certiorari denied, 402 U.S. 933, and *Super Tire Co.* v. *McCorkle*, 412 F. Supp. 192 (D. N.J.) (rejecting the contention that state payment of welfare benefits to strikers impermissibly alters the balance of power between labor and management).

Questions concerning the eligibility of strikers for welfare benefits are presently pending before this Court on petitions for writs of certiorari in *Batterton* v. *Francis* (No. 75–1181) and *Chamber of Commerce* v. *Francis* (No. 75–1182).

cisions, however, we see no need for plenary review by this Court.

CONCLUSION

For the reasons set forth above, the appeal should be dismissed for want of a substantial federal question.

Respectfully submitted.

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